

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 15-83:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
AFL-CIO

Complainant,

vs.

CITY OF KALISPELL
Defendant,

FINAL ORDER

* * * * *

No exceptions having been filed, pursuant to ARM
24.26.215, to the Findings of Fact, Conclusions of Law
and Recommended Order issued on September 12, 1984, by
Hearing Examiner Stan Gerke;

THEREFORE, this Board adopts that Recommended Order
in this matter as its FINAL ORDER.

DATED this 22nd day of October 1984.

BOARD OF PERSONNEL APPEALS

By Alan L. Josephson
Alan L. Josephson, Chairman
Board of Personnel Appeals

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct
copy of this document was mailed to the following on the
24th day of October 1984;

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STATE OF MONTANA
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IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 15-83:

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Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
RECOMMENDED ORDER

On November 7, 1983, the Complainant filed an unfair practice charge alleging Defendant's violation of Sections 39-31-401(1) (2), (3), (4) and (5), MCA. By Answer filed with this Board on November 25, 1983, the Defendant denied all charges.

Pursuant to Section 39-31-406(1) MCA, Kathryn Walker was assigned to investigate the alleged unfair labor practice. Ms. Walker's Report of Investigation issued January 25, 1984, indicated that the Complainant's charge, as stated, warranted dismissal for failure to allege and show facts which could be construed as a violation of the Act. The Report recommended that the charge be dismissed unless the Complainant amend the charge within five days from receipt of the Report.

On February 6, 1984, the Complainant filed an amended unfair labor practice charge with this Board alleging Defendant's violation of Section 39-31-401(1), (2), (3), (4), and (5) MCA. More specifically, the Complainant alleged that the Defendant discharged an employee because of union activities and that action was intended to discourage membership in the union. By Answer filed with this Board on March 12, 1984, the Defendant denied all charges.

1 A formal hearing in this matter was scheduled for May
2 2, 1984. On that date, counsel for the Complainant was
3 unavailable. The Parties present at the scheduled hearing
4 agreed to vacate and re-schedule.

5 A formal hearing in this matter was conducted May 23,
6 1984, at 1:00 p.m., in the Fire Department Training Room,
7 City Hall, Kalispell, Montana. The formal hearing was con-
8 ducted under authority of Section 39-31-406 MCA, pursuant to
9 ARM 24.26.682, and in accordance with the Administrative
10 Procedure Act (Title 2, Chapter 4, MCA).

11 ISSUES

12 1. Whether the City of Kalispell terminated Mr. L. E.
13 Scovel for union activity or for insubordination.

14 2. Whether or not the City of Kalispell violated
15 Section 39-31-401(1) MCA.

16 MOTIONS

17 1. The Defendant, the City of Kalispell, made a
18 Motion to Dismiss based upon Section 39-31-406(1) MCA which
19 states that, "The complainant and the person charged shall
20 be parties and shall appear in person or otherwise give
21 testimony at the place and time fixed in the notice of
22 hearing." The Defendant argued that neither the American
23 Federation of State, County and Municipal Employees, AFL-CIO
24 (AFSCME) nor George Hagerman, a representative of AFSCME,
25 was present at the formal hearing.

26 2. The Defendant made a Motion to Dismiss based upon
27 the allegation that the Unfair Labor Practice Charge was not
28 timely filed. The Defendant argued that the Investigation
29 Report issued in this matter found that the charges, as
30 originally filed, did not show a violation of the Act. The
31 Report fixed a deadline for the filing of an amended charge
32 and Complainant failed to file an amended charge within the
time limit set.

Both motions will be addressed in the Discussion.

STIPULATED FACT

1. Mr. L. E. Scovel was a member of the bargaining unit and a member of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

2. Mr. Scovel was employed by the City of Kalispell in the Street Department from August 23, 1982 to noon on September 15, 1983. He was reinstated October 3, 1983. Mr. Scovel was on leave without pay for eleven and one-half days.

3. Prior to September 15, 1983, Mr. Scovel's personnel file did not contain any letters of reprimand or other evidence of poor work performance.

4. On September 15, 1983, Mr. Scovel was a Shop Steward for AFSCME.

5. The collective bargaining agreement which exists between the City and AFSCME contains a section which addresses the posting of position vacancies.

6. Mr. Bill Clements is the Street Superintendent for the City of Kalispell and has been Mr. Scovel's immediate supervisor throughout Mr. Scovel's employment with the City. Mr. Clements is considered management and is not a member of the bargaining unit or a member of the union.

7. On September 15, 1983, shortly before noon, Mr. Scovel, acting in the capacity of union Shop Steward, went to Mr. Clements' office to discuss whether a recently filled position should have been posted. The two men were unable to agree if the position should have been posted and the discussion concluded with the understanding that Mr. Scovel would take the matter up with Mayor Leroy McDowell.

8. A few minutes later (after the discussion in Mr. Clements' office) in the City Shop parking lot a second dis-

1 discussion occurred between Mr. Scovel and Mr. Clements which
2 concluded with Mr. Clements firing Mr. Scovel.

3 FINDINGS OF FACT

4 After a thorough review of the record, including the
5 testimony of witnesses, the demeanor of the witnesses and
6 the exhibits, I make the following findings of fact:

7 9. On or about April, 1983, a work related incident
8 occurred between Mr. Scovel and Mr. Clements. It came to
9 the attention of Mr. Clements that Mr. Scovel may not have a
10 valid driver's license. Mr. Clements approached Mr. Scovel
11 on the matter and after some difficulty, including the
12 necessity of Mr. Clements sending Mr. Scovel home to re-
13 trieve the driver's license, Mr. Scovel produced a valid
14 chauffeur's license. Although Mr. Scovel satisfied Mr.
15 Clements' requirement of possessing a valid license, the
16 relationship between the two men apparently became strained.
17 Testimony indicated that as time passed Mr. Scovel avoided
18 verbal contact with Mr. Clements and would not enter the
19 City Shop where Mr. Clements' office was located. Mr.
20 Clements considered Mr. Scovel's actions an attitude problem
21 which affected his work performance. Mr. Clements attempted
22 to discuss the matter with Mr. Scovel by requesting meetings
23 with a union representative present, however, Mr. Scovel
24 managed to avoid any confrontations.

25 10. As reported in Stipulated Fact No. 8, a discussion
26 occurred between Mr. Clements and Mr. Scovel in the City
27 Shop parking lot shortly before noon which concluded with
28 Mr. Clements firing Mr. Scovel. After the discussion con-
29 cerning the non-posted position held in Mr. Clements' office
30 (see Stipulated Fact No. 7) Mr. Scovel walked to his pick-up
31 located in the City Shop parking lot. Mr. Scovel was
32 visiting with two other fellow employees about the non-

1 posted position when Mr. Clements came out of the City Shop,
2 got into his pick-up and drove over to where Mr. Scovel was
3 standing. As Mr. Clements approached, the two employees
4 visiting with Mr. Scovel hastily left. The testimony is
5 unrefuted that Mr. Clements remained in his pick-up and
6 asked Mr. Scovel through the window, "What's your problem?"
7 Mr. Clements maintains that his question was relative to Mr.
8 Scovel's attitude since the April, 1983, driver's license
9 incident. Mr. Scovel answered, "My only problem is finding
10 out if that position should have been posted." Because Mr.
11 Clements considered the discussion concerning the non-posted
12 position closed, he reminded Mr. Scovel that he was to see
13 the Mayor on that matter. Then Mr. Clements asked if Mr.
14 Scovel was mad because he had to work on the garbage crew
15 that particular work week. Most employees, including Mr.
16 Scovel, consider street crew work more desirable than gar-
17 bage crew work. General practice dictates that when a
18 manpower shortage occurs, more senior employees are shifted
19 to street crew work and less senior to garbage crew work.
20 Mr. Scovel, a less senior employee had been assigned to the
21 garbage crew at this point in time. In answer to Mr.
22 Clements' position, Mr. Scovel replied, "I probably should
23 be," and shook his finger in Mr. Clements' face. The
24 remainder of the actual discussion between the two men is
25 unclear. Mr. Clements maintains that Mr. Scovel threatened,
26 "I'll take you down so fast you won't know what happened."
27 Mr. Scovel denies that he said that, however, he does admit
28 that he shook his finger in Clements' face at least twice.
29 The incident ended with Mr. Clements firing Mr. Scovel and
30 Mr. Scovel indicating that he would return at 1:00 p.m.

31 11. Mr. Scovel, accompanied by Mr. Paul Marino, Vice-
32 President of the local union of AFSCME, attempted to see the

1 Mayor between noon and 1:00 p.m. After failing to contact
2 the Mayor during the lunch period, Mr. Scovel and Mr. Marino
3 went to see Mr. Clements who affirmed that he had fired Mr.
4 Scovel. After 1:00 p.m. Mr. Scovel and Mr. Marino returned
5 to the Mayor's office and were able to meet with him. The
6 Mayor requested that Mr. Scovel submit a written report
7 concerning the incident which resulted in his termination.

8 12. Both Mr. Clements and Mr. Scovel agreed that if
9 the parking lot incident had not occurred Mr. Scovel would
10 not have been fired.

11 DISCUSSION

12 The Defendant's first Motion to Dismiss is based upon
13 Section 39-31-406(1) MCA which indicates that in an unfair
14 labor practice charge hearing the complainant shall appear
15 or otherwise give testimony. In this matter a representa-
16 tive of AFSCME, George Hagerman, filed the unfair labor
17 practice charge in behalf of Mr. L. E. Scovel, a member of
18 AFSCME and the subject of the charge. Mr. Scovel was pre-
19 sent at the hearing and did give testimony. For these
20 reasons, the Defendant's first Motion to Dismiss is denied.

21 Defendant's second Motion to Dismiss is based upon the
22 unfair labor practice charge not being timely filed. It is
23 true that the Complainant failed to file an amended charge
24 within the limits set forth in the Investigation Report.
25 However, the Complainant could have, had the untimely
26 amended charge been dismissed, filed the charge anew within
27 the six months limitation set forth in Section 39-31-405
28 MCA. The re-filing of the same charge would have neces-
29 sitated the entire process, up to the formal hearing, to be
30 covered again in fruitless effort. For these reasons Defen-
31 dant's second Motion to Dismiss is denied.

1 It is a violation of the Collective Bargaining Act for
2 Public Employees for an employer to discharge or otherwise
3 discipline an employee based upon the employee's union
4 activity. This Board has consistently held that an unfair
5 labor practice consists of a discharge or other adverse
6 action that is based in whole or in part on an employee's
7 engagement in protected conduct. The National Labor Rela-
8 tion's Board in Wright Line, 251 NLRB 1083, 105 LRRM 1169
9 (1980), enforced, 662, F.2d 899, 108 LRRM 2513 (CA1 1981),
10 cert. denied 459 U.S. 989, 109 LRRM 2779 (1982), reformu-
11 lated the allocation of the burden of proof in such cases.
12 The "tests" developed in Wright Line, supra, which this
13 Board follows, have been upheld in NLRB v. Transportation
14 Management Corp., -US-, 76 L Ed 2d 667, 113 LRRM 2857
15 (1983). The first test is the requirement that the com-
16 plainant make a prima facie showing sufficient to support
17 the inference that protected conduct was a motivating factor
18 in the employer's decision. If the first test is satisfied,
19 the burden will shift to the employer in the second test to
20 demonstrate that the same action would have taken place even
21 in the absence of the protected conduct.

22 Applying the first test to this instant case, we find
23 that Mr. L. E. Scovel, acting in the capacity of union Shop
24 Stewart, inquired into the possible violation of the
25 existing labor agreement and was discharged the same day.
26 Surely these facts satisfy the first test of making a prima
27 facie showing sufficient to support the inference that
28 protected conduct was a motivating factor in the employer's
29 decision.

30 The second test now places the burden of proof upon the
31 Defendant, the City of Kalispell, to demonstrate that Mr.
32 Scovel's discharge would have taken place even in the

1 absence of the protected conduct. The City argued that Mr.
2 Scovel was terminated for insubordination, not for union
3 activity.

4 The record indicates that a strained relationship
5 existed between Mr. Scovel and Mr. Clements which originated
6 from the driver's license incident in April of 1983. Mr.
7 Scovel seemingly avoided confrontation with Mr. Clements at
8 all costs. Mr. Clements considered Mr. Scovel's actions as
9 a poor work attitude and attempted to discuss the matter
10 with Mr. Scovel to no avail.

11 On September 15, 1983, shortly before noon, Mr. Scovel,
12 acting in the capacity of union Shop Steward, entered Mr.
13 Clements' office and inquired about a recently filled posi-
14 tion that had not been posted pursuant to the posting proce-
15 dure outlined in the current labor agreement. Mr. Clements
16 explained that the position was temporary and he believed it
17 was not subject to the posting procedures. Mr. Scovel
18 disagreed, believing that all job vacancies were to be
19 posted. The discussion concluded with the understanding
20 that Mr. Scovel would discuss the matter with the Mayor.

21 A few minutes later after the discussion in Clements'
22 office, Mr. Clements approached Mr. Scovel in the City Shop
23 parking lot. Mr. Clements' question to Mr. Scovel, "What's
24 your problem?" was related to Mr. Scovel's behavior since
25 the driver's license incident that occurred in April of
26 1983. Mr. Scovel answered, "My only problem is finding out
27 if that position should have been posted." Mr. Clements
28 reminded Mr. Scovel that the matter of the non-posted posi-
29 tion had concluded between the two men and Mr. Scovel was to
30 proceed to higher authority - the Mayor. The discussion
31 between the two men quickly changed to those incidents
32 related to Mr. Scovel's behavior which occurred in the

1 latter few months. The discussion became heated and, at the
2 very least, Mr. Scovel threatened Mr. Clements by shaking
3 his finger in Mr. Clements' face. The discussion ended with
4 Mr. Clements firing Mr. Scovel.

5 I believe that Mr. Clements' actions in the two sepa-
6 rate incidents - the office discussion and the parking lot
7 discussion - were not related. In the office discussion Mr.
8 Clements disagreed with Mr. Scovel's assertion that all job
9 vacancies - both permanent and temporary - should be posted.
10 However, Mr. Clements acknowledged the fact, I believe, that
11 he was not the City's final authority on contract interpre-
12 tation and thus concurred in Mr. Scovel's intention to
13 contact the Mayor. I believe the conclusion of the office
14 discussion was also the conclusion of Mr. Clements' atten-
15 tion to the non-posted position matter. I believe the
16 parking lot discussion was prompted by Mr. Clements' exaspe-
17 ration with Mr. Scovel's behavior since the driver's license
18 incident. When tempers became heated, Mr. Scovel threatened
19 Mr. Clements in some manner and Mr. Clements over-reacted by
20 terminating Mr. Scovel. Mr. Clements' over-reaction is
21 evidenced by the termination being reduced to an eleven and
22 one-half day suspension. Both men agree that had the
23 parking lot discussion not taken place, Mr. Scovel would not
24 have been fired.

25 CONCLUSIONS OF LAW

26 The Defendant, City of Kalispell, did not violate
27 Section 39-31-401(1) MCA.

28 RECOMMENDED ORDER

29 IT IS ORDERED that Unfair Labor Practice No. 15-83 be
30 dismissed.

31 SPECIAL NOTE

32 Pursuant to ARM 24.26.604, the above RECOMMENDED ORDER
 shall become the FINAL ORDER of this Board unless written

1 exceptions are filed within 20 days after service of these
2 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER
3 upon the parties.

4 DATED this 12 day of September, 1984.

5 BOARD OF PERSONNEL APPEALS

6
7 BY: *Stan Gerke*
8 Stan Gerke, Hearing Examiner

9 CERTIFICATE OF MAILING

10 I, *Jennifer Jacobson*, do certify that a true and
11 correct copy of this document was mailed to the following on
the 12th day of September, 1984:

12 Glen Meier, City Attorney
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